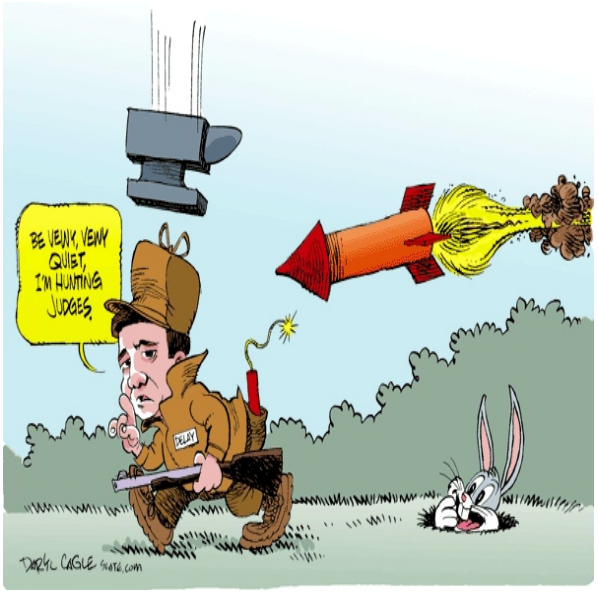
THE PUBLIC LAWYER
May 2, 2004



NEVADA CASES

http://www.leg.state.nv.us/scd/OpinionListPage.cfm

Aviation Adventures, Inc. V. Joan Morris, Inc., 121 Nev. Adv. Op. No. 13 (April 28, 2005). "This is an appeal from a district court order granting respondent's motion for summary judgment in an action to recover on a promissory note. We conclude that the district court improperly granted respondent's motion for summary judgment before the development of the record through discovery. We also conclude that insolvency is not a requirement to obtain a setoff. Inasmuch as our decision in *Campbell v. Lake Terrace, Inc*. requires the insolvency of one of the parties to assert a setoff, that case is overruled."

Sparks v. State, 121 Nev. Adv. Op. No. 12 (April 28, 2005). "In this appeal, we consider whether a provision of the written plea agreement known as the 'failure to appear' (FTA) clause is legally enforceable. The FTA clause releases the State from its promise to recommend, or refrain from recommending, a particular sentence if the defendant fails to appear for a scheduled sentencing proceeding or commits an additional criminal offense prior to sentencing. We conclude that the FTA clause is valid under Nevada law. Accordingly, in this case, the State did not breach the plea agreement by exercising its right under that provision to argue for the imposition of consecutive sentences."

Daniels v. State, 121 Nev. Adv. Op. No. 11 (April 28, 2005). "Daniels argues that police officers entrapped him by improperly tempting him with exposed money and a helpless victim. We disagree.

We addressed a similar entrapment claim in *Miller v. State*. In *Miller*, we reiterated that the entrapment defense requires proof of two elements: (1) the State presented the opportunity to commit a crime, and (2) the defendant was not otherwise predisposed to commit the crime. The entrapment defense represents the necessary balance between the permissible use of undercover officers to investigate crimes and the prohibition against inducing an innocent person

to commit a crime. Where the State uses undercover officers as decoys, we have 'drawn a clear line between a realistic decoy who poses as an alternative victim of potential crime and the helpless, intoxicated, and unconscious decoy with money hanging out of a pocket. The former is permissible undercover police work, whereas the latter is entrapment.'"

Miller v. State, 121 Nev. Adv. Op. No. 10 (April 28, 2005). "Miller argues that police officers entrapped him by improperly tempting him with exposed money and a helpless victim. We disagree.

"'The entrapment defense is made available to defendants not to excuse their criminal wrongdoing but as a prophylactic device designed to prevent police misconduct.'" "'[E]ntrapment encompasses two elements: (1) an opportunity to commit a crime is presented by the state (2) to a person not predisposed to commit the act.'" '[T]he Government may use undercover agents to enforce the law.' Nevertheless, undercover agents 'may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute.'"

Nevada Gold and Casinos, Inc. v. American Heritage, Inc., 121 Nev. Adv. Op. No. 9 (April 28, 2005). "In this appeal from a district court order denying appellants' motion to compel arbitration, we consider whether appellants have waived any right to demand arbitration by vigorously litigating the dispute in a Texas court. Applying an analytical framework crafted by the Eighth Circuit Court of Appeals, we conclude that appellants, knowing of their arbitration right, have acted inconsistently with an intent to arbitrate, and that they have thereby prejudiced respondents. We determine that appellants have waived arbitration, and so we grant respondents' motion to dismiss this appeal."

Dep't of Conservation and Natural Resources v. Foley, 121 Nev. Adv. Op. No. 8 (April 14, 2005). "This appeal raises questions of interpretation of the statutory scheme under which the appellant, the Nevada Department of Conservation and Natural Resources, Division of Water Resources, regulates water rights held by Nevada landowners. Because of Nevada's arid geography, vital public policy considerations dictate that the Division, through the State Engineer, monitor the beneficial use of water rights. This oversight occasionally requires cancellation of water rights due to forfeiture from lack of use or development. In this case, we resolve whether the Division must provide notice of cancellation of water rights to permit owners whose interests do not appear of record in the files of the State Engineer. We conclude that such notice is not required."

Jordan v. State ex rel. Dep't of Motor Vehicles and Pub. Safety, 121 Nev. Adv. Op. No. 7 (April 14, 2005). "In addition to challenging district court dispositions, these proper person appeals involve first impression issues regarding orders that place permanent restrictions on the ability of proper person litigants with in forma pauperis status to access the Nevada state courts. As both appeals raise similar questions of substantial importance, we considered them together. We conclude that the district court has authority to limit the court access of a litigant proceeding in proper person with in forma pauperis status when certain guidelines, designed to protect important constitutional rights, are followed."

RRTC Communications v. The Saratoga Flier, Inc., 121 Nev. Adv. Op. No. 6 (April 14, 2005). "In this appeal we consider whether NRS 611.030, which requires that employment

agencies operating in Nevada be licensed by the Labor Commissioner, applies to out-of-state executive recruiters. We conclude that NRS 611.030 does not require an executive recruiting agency operating in another state to obtain a Nevada license when that agency is hired for a single transaction by a Nevada employer."

McConnell v. State, 121 Nev. Adv. Op. No. 5 (March 24, 2005). "Late last year in *McConnell v. State*, this court affirmed appellant Robert Lee McConnell's judgment of conviction of first-degree murder and sentence of death. The State, however, seeks rehearing, challenging our holding that 'a felony may not be used both to establish first-degree murder and to aggravate the murder to capital status.' The Clark County District Attorney ('amicus') has filed an amicus brief in support of the State's position. At our direction, McConnell filed an answer to the rehearing petition, and the Nevada Attorneys for Criminal Justice also filed an amicus brief, opposing rehearing. We conclude that the State fails to demonstrate that this court overlooked or misapprehended any material points of law or fact, so we deny the petition."

Rhymes v. State, 121 Nev. Adv. Op. No. 4 (March 24, 2005). "Appellant Michael Rhymes appeals from his judgment of conviction. Rhymes contends that the district court erred in allowing the State to introduce evidence of prior bad acts and by failing to give a proper limiting instruction to the jury when the district court admitted the evidence in accord with this court's holding in *Tavares v. State*.

We conclude that the district court properly admitted the prior bad acts evidence. We also conclude that the district court erred by failing to give an appropriate limiting instruction at the time the district court admitted the uncharged bad acts evidence. We hold that when evidence of prior bad acts concerns acts uncharged in the instant proceeding, instructions must be given both at the time the evidence is admitted and again when the jury is charged. We reiterate that the State bears the burden of requesting such an instruction. Nevertheless, under the circumstances of this case, we conclude that the failure to give such an instruction constituted harmless error."

Carver v. El-Sabawi, 121 Nev. Adv. Op. No. 3 (March 24, 2005). "In this appeal, we consider whether a "mere happening instruction" and a res ipsa loquitur instruction, given to the jury in a medical malpractice case, were so conflicting that absent additional evidence, the judgment on the jury verdict should be reversed and this case remanded for a new trial. We conclude that they were."

Valley Elec. Ass'n v. Overfield, 121 Nev. Adv. Op. No. 2 (March 10, 2005). "This case presents an issue of first impression for Nevada, whether district courts in eminent domain actions may award landowners attorney fees under NRS 18.010. We conclude that fees are available under the statute."

Advisory Committee Approves Amendments to Federal Rules of Civil Procedure

April 21, 2005 Posted By PGE

http://www.ediscoverylaw.com

On April 14-15, 2005, the Civil Rules Advisory Committee met to discuss the fate of proposed amendments to Federal Rules of Civil Procedure relating to e-discovery. Taking into consideration feedback received during the recent public comment period, the Advisory Committee approved amendments to Rules 16,

26, 33, 34, and 45. The Committee also approved, in principle, amendments to Rule 37.

The proposed amendments will be transmitted to the Committee on Rules of Practice and Procedure for consideration at its June 2005 meeting, with a recommendation that the amendments be approved and transmitted to the Judicial Conference for consideration.

Mr. Alfred W. Cortese, who submitted live testimony during the public comment period on behalf of the United States Chamber of Commerce Institute of Legal Reform and Lawyers for Civil Justice, was in attendance. His report can be found here.

Zubulake Awarded $20.1 Million in Punitive Damages and $9.1 Million in Compensatory Damages

April 7, 2005 Posted By PGE

http://www.ediscoverylaw.com

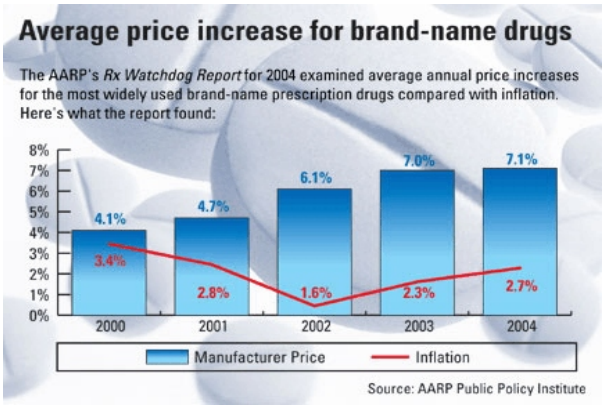
This exceptionally large award was ordered in a landmark employee discrimination case that addressed important e-discovery issues including the preservation of email, cost-shifting, and the restoration of backup tapes.

Zubulake's counsel told the jury that UBS had destroyed email and its officials had lied in court.

Judge Scheindlin instructed the jury to assume that email not preserved by UBS after Zubulake filed her complaint with the EEOC would have hurt UBS' case.

UBS says that it will appeal.

The story can be found at here.



NINTH CIRCUIT CASES

(Ninth Circuit cases can be found at http://www.ca9.uscourts.gov/ca9/neopinions.nsf)

Agster v. Maricopa County, No. 04-15466 (April 28, 2005). "The parents and the representative of the estate of Charles J. Agster III brought this action against individuals and Maricopa County and Maricopa County Sheriff's Office for the death of Agster while in the custody of the County. In this interlocutory appeal, the County challenges the order of the district court compelling production of the mortality review conducted by Correctional Health Services. We hold that we have jurisdiction to consider the County's claim of privilege, and we hold that federal law recognizes no privilege of peer review in the context of a case involving the death of a prisoner."

United States v. Gust, No. 04-30208 (April 26, 2005). "After entering a conditional guilty plea, Tony Lawrence Gust appeals his judgment of conviction for possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d). Pursuant to his plea agreement, Gust challenges the district court's denials of his suppression motion and his renewed suppression motion, arguing that the district

court erred in determining that he had no legitimate expectation of privacy in a locked container that the district court found was readily identifiable as a gun case based on its outward appearance.We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse the district court's denials of Gust's motion to suppress and his renewed motion to suppress and remand for further proceedings consistent with this opinion."

Boyde v. Brown, No. 02-99008 (April 21, 2005).
"We affirm the district court's decision to deny Boyde's petition for a writ of habeas corpus because of alleged errors in the guilt phase of his trial. We reverse its decision as to the penalty phase and remand for the district court to issue a writ of habeas corpus, unless within a reasonable time set by the district court the state conducts a new penalty phase trial or vacates Boyde's death sentence and imposes a lesser sentence consistent with law."

United States v. Pulliam, No. 03-50550 (April 21, 2005). "Following a lawful traffic stop of a car in which Defendant-Appellee Pulliam was a passenger, the police illegally detained him and the car's driver, and illegally searched the car. The search produced a gun, and Pulliam was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The government appeals from the district court's order suppressing the gun. The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and we have jurisdiction pursuant to 18 U.S.C. § 3731. Because Pulliam lacks standing to object to
the vehicle search, and the gun's discovery was not the product of Pulliam's unlawful detention, the gun should not have been suppressed. We therefore reverse and remand."

United States v. Caymen, No. 03-30365 (April 21, 2005). "We consider a motion to suppress evidence found on the hard drive of a computer that had been obtained by fraud.

Of course, what matters is not the details of the common law of larceny. What matters is a reasonable expectation of privacy that society is prepared to accept as reasonable, and one who takes property by theft or fraud cannot reasonably expect to retain possession and exclude others from it once he is caught. Whatever expectation of privacy he might assert is not a legitimate expectation that society is prepared to honor. Because, as the district court found, Caymen obtained the laptop computer by fraud, he had no legitimate expectation of privacy in the contents of the hard drive."

United States v. Callum, No. 02-10471 (April 20, 2005). "The federal wiretapping statute requires court orders approving wiretaps to 'specify . . . the identity . . . of the [Department of Justice official] authorizing the [wiretap] application.' We decide whether suppression is required when wiretap orders and corresponding applications say nothing about who authorized them.

Under the force of precedent, we uphold the challenged wiretap applications and orders. Still, we note that the Department of Justice and its officers did not cover themselves with glory in obtaining the wiretap orders at issue in this case."

Bains LLC v. ARCO Pords. Corp., No. 02-35906 (April 19, 2005). "Contrary to ARCO's interpretation of § 1981, our decisions hold that a corporation has standing to bring a § 1981 claim against a defendant that employs the corporation as a contractor, but imposes ethnic discrimination against the corporation's employees."

Baldwin v. Placer County, No. 04-15848 (April 19, 2005). "Placer County and several of its

police officers have taken this interlocutory appeal from the district court's denial of their motion for qualified immunity in this 42 U.S.C. § 1983 action brought by Michael Baldwin
and Georgia Chacko. On the basis of the facts conceded as undisputed by the County for purposes of this appeal, we hold that the County violated established constitutional rights of the plaintiffs and that qualified immunity was properly denied.

The County argues that 'objectively reasonable' officers could have believed that 'the exigency of the entry' justified the batteries on the plaintiffs. On the conceded facts before us, there was no exigency. Baldwin was a practicing dentist. Nothing in the record indicates that the officers had reason to believe that he would resist or flee. The officers had stated no belief that the plaintiffs would be armed; they mentioned no criminal history or conspiracy that could have justified such a belief. They had no reason not to identify themselves before giving orders to the plaintiffs. Invading a home in the early morning, they have stated no fact justifying their batteries. They violated the civil right of the plaintiffs to be free from battery by gun-wielding officers, a right established in this circuit since 1984."

United States v. Zone, No. 03-10361 (April 18, 2005). "Cortrayer Zone appeals from the district court's order denying his motion to dismiss his federal criminal indictment. He argues that the instant federal prosecution violates his rights under the Double Jeopardy Clause because federal prosecutors orchestrated a previous state plea agreement in order to obtain a sworn admission for use in the federal proceedings. Because Zone has produced no evidence that 'the state in bringing its prosecution was merely a tool of the federal authorities,' *United States v. Figueroa-Soto*, 938 F.2d 1015, 1019 (9th Cir. 1991) (quoting *Bartkus v. Illinois*, 359 U.S. 121, 123 (1959)) (internal quotation marks omitted), we affirm the district court's denial of his motion to dismiss and deny his request to remand for an evidentiary hearing and further discovery."

United States v. Nava, No. 03-30010 (April 18, 2005). "Victor 'Big Vic' Nava, Sr., was convicted of conspiracy to distribute and possession with intent to distribute methamphetamine. The jury also rendered a special verdict that several properties were used to facilitate his crimes or were proceeds of them and should be forfeited to the government pursuant to 21 U.S.C. § 853. Victor's daughter, Victoria Nava, petitioned the district court claiming that she held legal title to two of the properties. The district court denied Victoria's petition to set aside the forfeiture.

We must decide whether forfeiture was proper where Victor has never held title to the two forfeited properties. We reverse and remand."

Musladin v. LaMarque, No. 03-16653 (April 8, 2005). "At a murder trial in which the central question is whether the defendant acted in self-defense, are a defendant's constitutional rights violated when spectators are permitted to wear buttons depicting the 'victim'? We conclude that under clearly established Supreme Court law such a practice interferes with the right to a fair trial by an impartial jury free from outside influences."

Hudson v. Craven, No. 03-35408 (April 6, 2005). "This civil rights case stems from a community college instructor's claim that the college retaliated against her after she attended WTO protests with some of her students. Her claim is a hybrid one—it involves both speech and associational rights under the First Amendment. We are presented with an issue of first impression, namely the appropriate test for

benchmarking this hybrid right. We conclude that this case should be evaluated under the balancing test established in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), and that under *Pickering*, the college's legitimate safety and pedagogical concerns outweighed the instructor's rights. We affirm the district court's grant of summary judgment in favor of the college."

Hells Canyon Preservation Council v. United States Forest Serv., No. 03-35579 (April 5, 2005). "When a party withdraws one of its claims before the trial court enters judgment and the action is subsequently dismissed on the merits, does the trial court's failure to indicate that the withdrawn claim was dismissed without prejudice necessarily render its decision a 'final judgment on the merits' as to that claim? Because we answer this question in the negative, we reverse the district court's dismissal of this suit on res judicata grounds and remand for further proceedings."

San Jose Hells Angels v. City of San Jose, No. 02-17132 (April 4, 2005). "In this civil rights action under 42 U.S.C. § 1983, Defendants-Appellants, seven San Jose City Police Officers and Deputy Sheriff Linderman, appeal from an order of the district court denying in part their motions for qualified immunity. This action arises out of the simultaneous execution of search warrants at the residences of members of the Hells Angels, and at the Hells Angels clubhouse on January 21, 1998. While executing one of the search warrants at the residence of plaintiffs Lori and Robert Vieira, the officers shot two of the Vieiras' dogs. While searching plaintiff James Souza's property, the officers shot and killed one of Souza's dogs. During the course of the searches at all of the locations, the officers seized literally 'truckloads' of personal property for the sole purpose of showing in a murder prosecution that the Hells Angels had common symbols, which in turn would qualify it as a criminal street gang and therefore support a sentencing enhancement under California Penal Code § 186.22 against the defendant in that case. In seizing this 'indicia' evidence, the officers seized numerous expensive Harley-Davidson motorcycles, a concrete slab, and a refrigerator door and in so doing, caused significant damage to the items seized as well as to other property.

We affirm the district court's order denying the SJPOs and Linderman qualified immunity. We hold that Linderman's instruction to seize 'truckloads' of personal property, including numerous motorcycles and a piece of concrete, for the sole purpose of proving that the Hells Angels was a gang was an unreasonable execution of the search warrants in violation of the Fourth Amendment. We further hold that at the time the searches were carried out the law was sufficiently clear to put a reasonable officer on fair notice that this conduct was unlawful."

THE BLOGGING LIFE OF LAW STUDENTS

Shit. I'm fourth on the wait list for Advanced Constitutional Law: Civil Rights. Now I've got to find another two credit course that doesn't conflict with any of my other four courses. I'm thinking of possibly Education Law or Aviation Law. I have enough to think about without this.

Posted by Rogue Slayer Law Student at 4:07 PM

Public Sector Employee Surveys Done Right

By Katherine Mikkelson

ABA Government and Public Sector Lawyers Division

You can pretty much bet that factory workers toiling away in sweatshops at the turn of the century were not asked to fill out an employee survey. Fast forward one hundred and four years and you'll find that employee surveys are used in almost every industry imaginable. Done well, employee surveys gauge employee satisfaction, identify problems and are used by management to make improvements.

The practice of law is no exception and law firms and public sector agencies alike seek input from the front lines. Before you quickly draft a few questions and distribute them to all your employees, you might want to step back and think a little bit about what you want to accomplish. Consider the survey as a three-step process: the planning stage, the survey itself, and the resulting analysis and action plan.

Prior Proper Planning
Before you undertake a survey, it's vital that managers think about what they want to learn from employees. Do you want to gauge the level of employee satisfaction or are you more interested in the deficiencies of your client intake procedure? A survey cannot garner every bit of information under the sun, so it's better to have a few pointed objectives to help keep the questions focused.

If your budget allows, consider using a consultant or third party to administer the survey. "There is value to hiring a consultant," says Chicago-based Ed Gubman, founding partner of Strategic Talent, and author of the best selling book The Talent Solution (www.gubmanconsulting.com). "First, you will get the questions right. It will help tailor your survey to meet your objectives and you'll get a better analysis." When budget constraints are an issue, Gubman recommends using a consultant the first time and then taking a mini or "pulse" survey thereafter that focuses on a subset of questions, using a smaller sample of people.

After you have your questions, use focus groups to test them. "Focus groups are certainly an important part of the process," says Thomas Guterboch, director of the University of Virginia's Center for Survey Research (www.virginia.edu/surveys). Guterboch said that management usually sits down with the consultant and outlines the objectives of a survey but that with almost every survey he has worked on, the line employee has provided additional ideas. "And if an instrument is custom-written, [a focus group] may be the only chance to see what is confusing and needs clarification."

Before you roll out the survey, communicate the purpose and relevance to employees. Let them know what you are trying to accomplish and what you hope to do with the results. Because surveys are often met with skepticism, it's important for employees to buy into the process to improve the response rate. "Management needs a marketing plan, but don't oversell it [by promising] that it will radically change everything," says Guterboch. "Be clear about the objectives and the amount of time it will take and that it's confidential and voluntary."

The Survey Itself
Questions should be organized in a logical sequence. One method commonly used is to ask the "big picture" questions first, winnowing down to more specific questions for each subject area. For example, you could ask, "Is creativity and innovation rewarded?" followed by, "Are employees rewarded for providing quality information to the client?" and then, "Are high-performing employees in your work unit recognized or rewarded on a timely basis?" When questions are randomly asked with no apparent concern for their order, employees may become confused and may even question the intent of the survey. "Grouped questions allows

employees to focus their thought and answer more thoroughly," says Guterboch.

If at all possible, use the internet for employees to respond. "It will boost your response rate to between 70 and 84 percent versus 50 percent with a paper and pencil survey," says Gubman. "The only reason to use a paper and pencil survey is if you have employees who do not have access to the internet."

Beware of surveying employees too often. In 2003, Prince William County, Virginia, surveyed its county employees and plans to do it every two years. "It's not enough time to gauge the results if it's done every year," says Michelle Robl, Assistant County Attorney. Be sure you are not overburdening employees with an excessive amount of questions; usually people begin to get irritated after 80 questions. Last, think about the timing of the survey. Don't launch the survey three days before budgets are due to the legislature. Steer clear of any crunch periods where staff will be unusually busy.

Analysis and Action Plan

Now that you have your data, its time to examine it. Do your attorneys feel that administrative personnel are not communicating with them? Do the administrative personnel feel as if they are being overworked by the attorneys? Again, the consultant will be able to assist you by determining the issues that many people have identified as problematic and identify themes. The consultant will also be invaluable as an objective party communicating to management the problem areas. "An outsider will be able to tell it like it is," says Gubman.

Once the data is collected and a report compiled, share the results with every single employee. One Division member with a North Carolina state agency related how, after a survey several years ago, the agency failed to share the results with all employees. "The results were not provided to the employees because they were so embarrassingly awful for some managers," the member wrote, via email. "It engenders a high level of frustration and sometimes anger when employees are told they'll get survey results and changes will be made and neither happens."

Experts suggest that you release the results as quickly as possible after the survey is conducted. "It shows employees you are serious about doing something and the information is fresh, timely and valuable," says Gubman. Beyond just sending out an email with a copy of the results attached though, managers should meet with their units to go over the results, clarify issues and discuss possible action.

Most importantly, the results should be used to make some positive changes. If employees reveal that inter-department relations are strained, perhaps some simple, low-cost methods can be implemented (social events, regular meetings, email mail discussion groups) for improving those relations. Knowing that employees have had an opportunity to weigh in and that management is doing something about it can help improve morale and pave the way for the next survey. "If you won't listen to what employees have to say, you shouldn't be doing [a survey] in the first place," says Gubman.

Today's Words:

Prolegomenon *(Noun)*

Pronunciation: [pro-lê-'gah-mê-nahn]

Definition 1: A preliminary discussion; a preface or foreword.

Usage 1: The plural is "prolegomena" [pro-lê-'gah-mê-nah]. The adjective is "prolegomenous."